

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JESUS FLORES

Claimant

VS.

GREAT BEND PACKING COMPANY, INC.

Respondent

AND

HOME INSURANCE COMPANY

Insurance Carrier

Docket No. 162,414

ORDER

Claimant requested review of the Award entered by Administrative Law Judge George R. Robertson dated January 26, 1995.

APPEARANCES

Claimant appeared by his attorney, Stanley R. Ausemus of Emporia, Kansas. Respondent and its insurance carrier appeared by their attorney, Orvel Mason of Arkansas City, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge found that claimant had failed to prove that he sustained personal injury by accident arising out of and in the course of his employment with respondent for which an award of benefits was warranted and, therefore, denied all benefits. Claimant requested review of that finding. The issues now before the Appeals Board are:

- (1) Whether the Appeals Board may review an issue not listed in the application for review.
- (2) Whether claimant sustained personal injury by accident arising out of and in the course of his employment with respondent.
- (3) The nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be modified to grant claimant the temporary total disability and medical expense associated with the January 1992 accident.

(1) The first issue is a procedural one. The respondent and its insurance carrier contend the Appeals Board should not consider the issue whether claimant sustained personal injury by accident arising out of and in the course of his employment with respondent because that issue was not listed in claimant's application for review. That argument is without merit. The Appeals Board has consistently held that neither statute nor regulation require the parties to list the issues in the application for review for which they seek review. Once a proceeding is properly appealed to the Appeals Board, the Board has the jurisdiction and authority to review any of the issues that were before the administrative law judge as is necessary to adjudicate the claim. See K.S.A. 1995 Supp. 44-555c.

(2) Claimant contends he fell while working for respondent on January 3, 1992, and injured his shoulders, back, legs, right arm, and right hand. Respondent does not admit the accident occurred and denies the extent of claimant's alleged injuries.

Claimant testified that on January 3, 1992, while at work and performing his regular job duties, he fell, was rendered unconscious, and taken by ambulance to the hospital. That testimony is uncontroverted. Because that testimony is uncontroverted and is not unreasonable, the Appeals Board finds that claimant did sustain an accident on January 3, 1992, which arose out of and in the course of claimant's employment.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

(3) The Administrative Law Judge found that claimant failed to establish that he suffered permanent injury or disability as a result of the January 1992 accident. The Appeals Board agrees.

Respondent presented the testimony of board-certified orthopedic surgeon C. Reiff Brown, M.D., who began treating claimant in February of 1992. Dr. Brown saw claimant on three occasions before seeing him a fourth and final time in May 1992. Dr. Brown found that claimant was exaggerating his symptoms. Dr. Brown concluded that claimant did not have any evidence of a permanent impairment and, therefore, did not need any permanent work restrictions or limitations. Dr. Brown's opinion is supported by the conclusion of clinical psychologist Donald E. Schrag, Ph.D., who evaluated claimant in August 1992 and found that claimant was malingering.

The Appeals Board is mindful that board-certified orthopedic surgeon Nathan Shechter, M.D., examined claimant in October 1992 and testified that claimant sustained musculoligamentous injuries to the cervical, thoracic, and lumbar spine that constitute a 10 percent whole body functional impairment. However, even Dr. Shechter admitted that "[a] great deal of his symptoms are due to a functional overlay."

Claimants bear the burden of proof to establish their claim. "Burden of proof" is defined in K.S.A. 1991 Supp. 44-508(g) as "the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

" . . . on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 1991 Supp. 44-501(a).

Based upon the entire record, including the testimony of coworkers and a former friend, the Appeals Board finds that claimant has failed to sustain his burden of proving permanent injury or disability arising out of and in the course of his employment with respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge George R. Robertson dated January 26, 1995,

should be, and hereby is, modified; that claimant is entitled to 7 weeks of temporary total disability benefits and the medical treatment associated with the January 3, 1992, accident.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jesus Flores, and against the respondent, Great Bend Packing Company, Inc., and its insurance carrier, Home Insurance Company, for an accidental injury which occurred January 3, 1992, and based upon an average weekly wage of \$365.26 for 7 weeks of temporary total disability compensation at the rate of \$243.52 per week or \$1,704.64, which is due and owing and is ordered paid in one lump sum less any amounts previously paid. Further, claimant is granted an award of medical benefits for the medical treatment rendered as a result of the January 3, 1992, accident.

The Appeals Board hereby adopts the order for the payments of the administration expenses as set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS
Orvel Mason, Arkansas City, KS
Administrative Law Judge, Salina, KS
Philip S. Harness, Director